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Numbers, Motivated Reasoning, and Empirical Legal Scholarship

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RESPONSE

Numbers, Motivated Reasoning, and Empirical Legal Scholarship

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In *Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First Amendment*, the authors explain that they are concerned that justices might be more likely to protect the speech of litigants with whom they sympathize ideologically or whom they view as being on the same team.[1] Starting from the premise that liberal justices are inherently more likely to support First Amendment claims and conservative justices are more likely to reject them, they find systematic departures from this baseline depending on the speakers or the content of the speech.[2] In his comprehensive critique of *Do Justices Defend the Speech They Hate?*, Todd Pettys provides numerous reasons why the authors' conclusions must be taken with a grain of salt.[3] In this Response, I suggest that part of the problem for the authors (as it is for much empirical legal scholarship more

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1. *See* Lee Epstein, Christopher M. Parker & Jerffrey A. Segal, *Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First Amendment*, 2-3 *available at* http://epstein.wustl.edu/research/InGroupBias.pdf (last visited Feb. 10, 2015) [hereinafter Epstein et al., *In-Group Bias*].

2. *See generally id.*

3. *See generally* Todd E. Pettys, *Free Expression, In-Group Bias, and The Court's Conservatives: A Critique of the Epstein-Parker-Segal Study*, 63 BUFF. L. REV. 1 (2015).

generally) stems from an inaccurate placement of ideology in opposition to an ideal of legal neutrality and a static notion of the ideological valence of various issues.

As I have argued elsewhere, many cases decided by the Supreme Court involve indeterminate constitutional or statutory language, a lack of clear precedent, and competing values and interests.[4] How the justices resolve those cases *inevitably* involves weighing values and making judgments.[5] One can call those types of determinations ideological, subjective,[6] or something else; one can disagree—vehemently—with the decisions and reasoning of particular justices and particular cases; and one can even argue that some justices appear to be more aggressive than others (even inappropriately aggressive) in their decisions, in making broad statements with strong ideological implications, or in declining to defer to the other branches of government or to precedent. But we cannot look seriously at the work of the Court and claim that the hardest cases the justices confront have legally neutral answers that can be objectively determined. And if we are honest about that reality, then we have to admit that, to some degree, it is the justices' job to make decisions that inherently have some ideological content.[7] What we should be arguing about, then, is the nature of those ideological judgments and the extent to which they are and should be manifest in both case outcomes and the content of opinions.[8]

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4. *See* Carolyn Shapiro, *Claiming Neutrality and Confessing Subjectivity in Supreme Court Confirmation Hearings*, 88 CHI.-KENT L. REV. 455, 457-58, 471-72 (2013); Carolyn Shapiro, *The Context of Ideology: Law, Politics, and Empirical Legal Scholarship*, 75 MO. L. REV. 79, 81, 126-28 (2010) [hereinafter Shapiro, *Context of Ideology*]. In *Context of Ideology*, for example, I used Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007), as an example, explaining that the key texts—the Fourteenth Amendment and Brown v. Board of Education, 347 U.S. 483 (1954)—were indeterminate, requiring the justices to make "political judgments, informed by their value-laden understanding of the meaning of *Brown*." Shapiro, *Context of Ideology*, *supra*, at 127.

5. *See* Shapiro, *Context of Ideology*, *supra* note 4, at 127.

6. RICHARD A. POSNER, HOW JUDGES THINK 258, 289 (2008).

7. Shapiro, *Context of Ideology*, *supra* note 4, at 126.

8. *Id.* at 122.

Put in the context of the First Amendment cases examined in *In-Group Bias*,[9] this concern suggests to me that the authors have framed their question in the wrong way. The issue may be not so much whether the justices are biased towards members of their favored groups, but to what extent the balance of competing values and interests leads to different results for First Amendment claims in different contexts.[10] Pettys suggests as much in his discussion of Justice Alito's votes in the campaign finance cases.[11] Noting that in one case, Justice Alito voted in favor of the First Amendment rights of a Democratic claimant, Pettys says, "Justice Alito himself would surely say he has a nonpartisan view of political speech and the First Amendment, and this view renders campaign-finance restrictions especially vulnerable to constitutional attacks, no matter whom those restrictions benefit or burden in a given case."[12] In other words, under this view, Justice Alito is balancing various considerations and values in the campaign finance context. Agree or disagree with the balance he strikes, or accuse him of striking a balance that in general favors his political compatriots, but I do not believe that what he is doing can be fairly characterized as in-group bias as the authors have described it.

This perspective does not mean that one must simply accept any Supreme Court decision as correct or justifiable.[13] One can certainly argue that competing values play an inappropriate role in some cases or for some justices. For example, many have argued that for some justices, their antipathy to reproductive rights inappropriately leads them to vote in favor of the First Amendment rights of abortion protesters.[14] But it is one thing to say that these justices are

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9. *See* Epstein et al., *In-Group Bias*, *supra* note 1, at 5-6.

10. *See* Shapiro, *Context of Ideology*, *supra* note 4, at 82-85, 110.

11. Pettys, *supra* note 3, at 66-67.

12. *Id.* at 66.

13. Shapiro, *Context of Ideology*, *supra* note 4, at 128.

14. For critiques of McCullom v. Coakley, 134 S. Ct. 2518 (2014), see, e.g., Trevor Bumis, *Injordinances: Labor Protests, Abortion-clinic Picketing, and* McCullen v. Coakley, 2014 CATO SUP. CT. REV. 167, 169 (discussing whether the political ideology of certain justices causes them to view abortion protesters as

allowing their views on one highly contested issue to affect their analysis of the protesters' First Amendment rights[15] and to argue about whether that is appropriate or not, and it is another altogether to say that it is unconscious empathy for the protesters themselves that leads the justices to abandon their otherwise consistent (though ideological) views of the First Amendment.[16]

Similarly, the authors explain that pro-First Amendment positions have long been seen as liberal positions.[17] And although they acknowledge that increasingly, liberals are more likely to vote in favor of regulation than they used to be, and vice versa for conservatives, the authors appear to believe that the ideological salience and valence of the First Amendment itself is static across time and context.[18] But this is not so.[19] To explain this idea, we can return to campaign finance. Campaign finance, with all of the competing values it presents, is unquestionably a hot-button political issue, and in general, conservative justices have voted to strike down regulations while the liberals have more often been in

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more or less sympathetic); Dan V. Kozlowski, *Content and Viewpoint Discrimination: Malleable Terms Beget Malleable Doctrine*, 13 COMM. L. & POL'Y 131, 133-35 140-51 (2008) (remarking on the general susceptibility of abortion free speech cases to be influenced by the personal politics of individual justices); Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech about Favored Rights:* Hill v. Colorado*, the Vanishing Public Forum and the need for an Objective Speech Discrimination Test*, 51 AM. U.L. REV. 179, 220-22 (2001) (noting the presence and influence of political preferences in the Supreme Court decision *Hill v. Colorado*).

15. In fact, Justice Scalia has been explicit that he is doing exactly this. In *Hill v. Colorado*, he explained that, because there was no the possibility of outlawing abortion through the political process, abortion opponents had an even more urgent need to get their message across to individual women. 530 U.S. 703, 741-42 (2000) (Scalia, J., dissenting).

16. Epstein et al., *In-Group Bias*, *supra* note 1, at 6.

17. *Id.* at 5.

18. *See id.*

19. Shapiro, *Context of Ideology*, *supra* note 4, at 94-97 (discussing Anna Harvey and Michael Woodruff's work).

dissent.[20] This is so regardless of who the plaintiff is.[21] In this context, then, the valence of the First Amendment issue itself is the opposite of what the authors would predict. But this is not because of the identity of the parties per se, but rather because of the justices' views about the regulation of money in politics.[22] Being in favor of regulation in this context is simply not a conservative position in American politics today.

If there is some kind of bias at work in the campaign finance cases,[23] it may be that the justices vote for outcomes that they believe are more favorable to the advancement of their overall ideological views. And we cannot assume that if such bias exists in the campaign finance context, similar biases would be present in other types of First Amendment cases that, for example, do not directly implicate partisan politics.[24] But evaluating these possibilities requires a much more fine-grained analysis than simply looking at which justices vote which way.[25] Likewise, in the campaign finance context, we can, for example, criticize the conservative justices for defining corruption so narrowly that many of the justifications for campaign finance regulation become irrelevant.[26] But as with the abortion protester cases, the problem, if there is one, is not necessarily that the justices have abandoned their First Amendment principles. It is that we might disagree substantively with what those principles are and how they interact with the justices' views on other important issues. That's a conversation worth having.

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20. *See, e.g.*, Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011); Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010); Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008).

21. *See Citizens United*, 130 S. Ct. 876 (plaintiff is conservative PAC); *Davis*, 554 U.S. 724 (plaintiff is democrat politician); Pettys, *supra* note 3, at 61-68 (citing *Bennett*, 131 S. Ct. 2806 (plaintiff is conservative PAC).

22. *See* Pettys, *supra* note 3, at 66-70.

23. *See Bennett*, 131 S. Ct. 2806; *Citizens United*, 130 S. Ct. 876; FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007).

24. Shapiro, *Context of Ideology*, supra note 4, at 134.

25. *See* Pettys, *supra* note 3.

26. *Citizens United*, 130 S. Ct. at 908-09 (holding that only *quid pro quo* corruption can be legitimately targeted by campaign regulation).